No. 88-512

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MICHIGAN, PETITIONER

v.

TYRIS LEMONT HARVEY

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether respondent's direct testimony at trial could be impeached with a statement obtained from him in violation of *Michigan* v. *Jackson*, 475 U.S. 625 (1986).

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INTEREST OF THE UNITED STATES

This case presents the question whether statements obtained from a defendant in violation of the rule adopted in *Michigan* v. *Jackson*, 475 U.S. 625 (1986), may be used to impeach the defendant if he testifies at trial. Because the *Michigan* v. *Jackson* rule protects the Sixth Amendment right to counsel, the issue can arise in both federal and state prosecutions.[1] The United States therefore has a law enforcement interest in the outcome of this case.

[1] Federal and state courts have reached divergent results on the issue whether a defendant may be impeached by statements obtained in violation of the Sixth Amendment. Cases permitting impeachment include *United States* v. *Lott*, 854 F.2d 244 (7th Cir. 1988); *United States* v. *McManaman*, 606 F.2d 919 (10th Cir. 1979); *United States* v. *Taxe*, 540 F.2d 961 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977); *State* v. *Thomas*, 698 S.W.2d 942 (Mo. 1985); *People* v. *Maerling*, 64 N.Y.2d 134, 485 N.Y.S.2d 23, 474 N.E.2d 231 (1984); and *State* v. *Swallow*, 405 N.W.2d 29 (S.D. 1987). Cases prohibiting impeachment

STATEMENT

1. On June 11, 1986, respondent rang the doorbell of Audrey Sharp's house in Detroit, Michigan, and asked to use the telephone. Sharp, according to her trial testimony, admitted respondent into the house. Shortly thereafter, while Sharp was sitting at her kitchen table, respondent approached her from behind holding a barbecue fork. After he ordered her to get up, Sharp grabbed respondent's hand. A struggle began, during which respondent tried to push Sharp toward the basement. Sharp resisted, and when respondent put his hand over Sharp's mouth, she bit him on the hands and arm. Respondent then bit Sharp on the back, threw her to the floor, and punched her repeatedly in the face. Sharp escaped to the living room, but respondent followed her with the barbecue fork and a pair of garden shears. Respondent then ordered Sharp to remove her clothing, after which respondent forced her to submit to oral sex and raped her. Tr. 12-27, 55-70, 75.

Respondent was subsequently arrested in connection with the incident. On the morning of July 2, respondent gave a statement to a police officer in which he claimed that he and Sharp had fought because Sharp had refused to pay for cocaine that respondent had shared with her. Respondent denied that any sexual contact had occurred between him and Sharp. When the officer presented the three-page statement to him to sign, respondent signed the first page, but he refused to sign the last two pages because, in respondent's words, the officer "wrote some stuff I didn't like * * * something that wasn't pertaining to

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include *Meadows* v. *Kuhlmann*, 812 F.2d 72 (2d Cir.), cert. denied, 482 U.S. 915 (1987); *United States* v. *Brown*, 699 F.2d 585 (2d Cir. 1983); *Bishop* v. *Rose*, 701 F.2d 1150 (6th Cir. 1983); *People* v. *Knippenberg*, 66 Ill. 2d 276, 362 N.E.2d 681 (1977); and *People* v. *Gonyea*, 421 Mich. 462, 365 N.W.2d 136 (1984).

what happened." Pet. App. 2a. Respondent then requested an attorney, and the interrogation ceased. Later that day, respondent was arraigned on charges of criminal sexual conduct, and counsel was appointed for him. Pet. App. 3a.

On September 9, 1986, six days before trial, respondent told a police officer that he wanted to make another statement. He added that he did not know if he should talk to his lawyer first. The officer told respondent that he did not need to talk to his lawyer, because his lawyer would receive a copy of the statement in any event. Pet. App. 3a; J.A. 32-33; Tr. 117. Respondent then signed a constitutional rights waiver form. He initialed the portions of the form advising him of his right to remain silent (including the right not to answer questions or make statements), his right to have a lawyer present before or during questioning, and his right to have a lawyer appointed for him. He did not initial the portion of the form advising him of his right to decide to stop answering questions at any time, or the portion advising him that anything he said could be used against him in court. When asked if he understood his constitutional rights, respondent answered that he did. Pet. App. 3a-4a. Respondent then gave a statement that differed in a few respects from the testimony he would give at trial, and differed significantly from the statement he had given on July 2.

2. Testifying in his own behalf, respondent gave a very different account of the events of June 11 from the account given by Sharp. Respondent testified that he had seen Sharp outside her house and had asked her if she wanted to share some cocaine. He then went into Sharp's house and, after smoking some of the cocaine, asked her if she would have sex with him in return for the cocaine. According to respondent, Sharp agreed to that proposal, but

at that point Sharp's sister arrived. Respondent testified that he and the victim's sister left the house to purchase more cocaine and later returned. According to respondent, another man then arrived at the house and left with Sharp's sister. J.A. 5-6, 13-14; Tr. 98-99, 104.

Respondent testified that after the others had left, he again asked Sharp to have sex with him, but this time she refused. Respondent claimed that he and Sharp argued, that she stabbed him with a fork and bit his arm, and that he then punched Sharp in the face and bit her on the back. Respondent testified that after further argument, Sharp acquiesced in his request for sex. According to respondent, however, the cocaine had hindered his ability to engage in sexual activity, and he never actually had sexual intercourse with Sharp. J.A. 6-8, 15-20; Tr. 99-100, 105-108.

On cross-examination, the prosecutor used respondent's July 2 statement to impeach his testimony. Specifically, the prosecutor asked why respondent's July 2 statement omitted certain portions of the story respondent told at trial. J.A. 23-31; Tr. 110-116. Respondent replied that he had given the police investigator some of the information he had recounted in his trial testimony, but that the investigator had failed to include those details in the written statement. J.A. 27-29; Tr. 113-114. Respondent also denied saying some of the things that were attributed to him in the July 2 statement. J.A. 30-31; Tr. 115. Respondent's counsel did not object to that cross-examination.

The prosecutor then asked respondent whether he had given the police a statement on September 9. J.A. 31-32; Tr. 116. Defense counsel objected to the use of the September 9 statement "for substantive evidence," but when the prosecutor explained that she would only be using it for impeachment, defense counsel did not interpose

any further objection. J.A. 32-34; Tr. 117. The prosecutor then asked petitioner about several points that were included in his trial testimony but omitted from his September 9 statement. J.A. 34-39; Tr. 118-121.

3. Respondent was convicted and sentenced to a term of six to ten years' imprisonment. On appeal, respondent challenged the use of both the July 2 and September 9 statements to impeach him. The Michigan Court of Appeals upheld the use of the July 2 statement. It ruled that, despite the lack of any showing in the record that respondent had received *Miranda* warnings prior to making that statement, the use of the statement for impeachment purposes did not violate respondent's Fifth and Fourteenth Amendment rights because the statement had not been involuntary. Pet. App. 5a-6a.

The court reached a different result with regard to the September 9 statement. That statement, the court held, was obtained from respondent "in violation of [his] Sixth Amendment right to counsel." Pet. App. 6a-7a (citing *Michigan* v. *Jackson*, 475 U.S. 625 (1986)). According to the court, "[a] statement so acquired may not be used for any purpose, including impeachment." Pet. App. 7a. The court noted that respondent's counsel did not object to the use of the September 9 statement for impeachment purposes, but the court nonetheless found the use of that statement to be constitutional error. Finally, the court held that the admission of the statement was not harmless error, because the trial "involved a credibility contest between defendant and victim." *Ibid.* The court therefore reversed respondent's convictions.[2] The Michigan Supreme Court, with three justices dissenting, denied the State leave to appeal. Pet. App. 8a-9a.

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[2] The "state court decision fairly appears to rest primarily on federal law" as required by *Michigan* v. *Long*, 463 U.S. 1032, 1040

SUMMARY OF ARGUMENT

A. It is a "general rule" of our system of justice that "remedies should be tailored to the injury suffered from [a] constitutional violation and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). Consistently with that principle, this Court has held that violations of the Fourth Amendment are sufficiently redressed at trial when the government is prohibited from using unlawfully obtained evidence as part of its case in chief. The futher prohibition against the use of illegally seized evidence to impeach is not required for deterrent purposes, and it undermines the truth-seeking goal of the criminal trial. See *United States* v. *Havens*, 446 U.S. 620 (1980); *Walder* v. *United States*, 347 U.S. 62 (1954).

Because of similarities in the operation of the exclusionary rules under the Fourth and Sixth Amendments, the same principles should apply to statements obtained as a result of pretrial interrogation conducted in violation of the Sixth Amendment. The Sixth Amendment, like the Fourth Amendment, does not expressly require the exclusion of evidence at trial; that remedy is the product of a

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(1983). The state court of appeals clearly defined the question as a "Sixth Amendment right to counsel" issue. Pet. App. 6a. After citing *Michigan* v. *Jackson* in order to identify the type of Sixth Amendment violation involved, the court supported its conclusion that the disputed evidence had to be excluded by citing two federal appellate court decisions. It then noted simply that "Michigan law is consistent." Pet. App. 7a. Cf. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 678 n.3 (1986). Should there be any doubt, Michigan law rests upon a decision, *People* v. *Gonyea*, 421 Mich. 462, 365 N.W.2d 136 (1984), in which the deciding vote was cast by a concurring judge who appeared to rely solely upon the Sixth Amendment in ruling that evidence obtained without a valid waiver is inadmissible for impeachment. See 421 Mich. at 481-483, 365 N.W.2d at 145 (Cavanagh, J., concurring).

court-made rule designed to enforce the constitutional prohibition. And the Court has held that the application of the Sixth Amendment exclusionary rule, like the Fourth Amendment exclusionary rule, must be determined by balancing the societal costs of the rule against its benefits. *Nix* v. *Williams*, 467 U.S. 431, 446 (1984).

The interest in promoting the truth-seeking process is at its greatest when one party to the trial seeks to demonstrate that the other party is relying on false evidence. For that reason, the case against the exclusion of reliable evidence at trial is at its strongest when impeachment evidence is at issue. And, as in the Fourth Amendment context, the deterrent effect of the Sixth Amendment exclusionary rule is adequately served by the exclusion of improperly obtained evidence from the government's case in chief; the marginal deterrent effect of excluding the evidence for impeachment purposes is insufficient to overcome the overriding interest in protecting the truth-seeking process at trial.

If anything, the argument in favor of exclusion is weaker in the Sixth Amendment context than in the Fourth Amendment setting. The underlying purpose of the Sixth Amendment is to ensure that the defendant has counsel so that the adversary process will function effectively to achieve justice. Because the Sixth Amendment is intended to promote the effective operation of the adversary system, this Court in its Sixth Amendment decisions has focused not only on the right to counsel, but more generally on "the ability of the adversary system to produce just results." *Strickland* v. *Washington*, 466 U.S. 668, 689, 692 (1984). Because the exposure of false testimony is perhaps the most important function of the adversary process, permitting the use of evidence for im-

peachment purposes is consistent with the purposes of the Sixth Amendment, even if the evidence was improperly obtained.

B. The argument for admitting respondent's pretrial statement is particularly strong in this case, because the violation found by the court here was not a direct violation of the Sixth Amendment, but a violation of the prophylactic rule adopted by this Court in *Michigan* v. *Jackson*, 475 U.S. 625 (1986). That rule provides that unless the defendant initiates contact with the police, a court may not recognize a waiver of the Sixth Amendment right to counsel once the defendant has made a request for counsel.

This Court has previously held that violations of the prophylactic rule adopted in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), are adequately deterred by barring the affirmative use of improperly obtained evidence; the Court has declined in that setting to require the exclusion of evidence offered for impeachment purposes. See *Harris* v. *New York*, 401 U.S. 222 (1971); *Oregon* v. *Hass*, 420 U.S. 714 (1975).

The same analysis applies in this case. As in the case of violations of the prophylactic rule designed to protect the Fifth Amendment privilege against compulsory self-incrimination, violations of the rule in *Jackson* do not require the exlusion of evidence for impeachment purposes. The Court's recent decision in *Patterson* v. *Illinois*, 108 S. Ct. 2389 (1988), removes any doubts on that score. The Court in *Patterson* held that the warnings required by this Court in *Miranda* are sufficient to support a waiver of the right to counsel under the Sixth Amendment. In the case of pretrial interrogation, the Court explained, an attorney serves the same "limited purpose" whether the interrogation occurs before or after the initiation of formal charges.

In that setting there is therefore no justification for according different treatment to violations of the prophylactic rule designed to protect a suspect's rights under the Fifth Amendment and the prophylactic rule adopted in *Jackson*, which is designed to protect a defendant's rights under the Sixth Amendment.

ARGUMENT

OUT-OF-COURT STATEMENTS TAKEN WITHOUT A VALID WAIVER OF THE SIXTH AMENDMENT RIGHT TO COUNSEL MAY BE USED FOR IMPEACHMENT PURPOSES AT TRIAL

A. The Sixth Amendment Exclusionary Rule Should Be Applied In This Setting In The Same Manner As The Fourth Amendment Exclusionary Rule

1. This Court has long held that evidence obtained in violation of the Fourth Amendment may be used to impeach a defendant's testimony at trial. In *Walder* v. *United States*, 347 U.S. 62 (1954), the Court ruled for the first time that the Fourth Amendment exclusionary rule, which bars the affirmative use of illegally seized evidence, should not be extended to bar the use of that evidence for impeachment purposes. The defendant in *Walder*, who had been indicted for trafficking in narcotics, took the stand and denied that he had ever possessed or sold narcotics. *Id.* at 63. After he reiterated his testimony on cross-examination, the government introduced evidence that the defendant had possessed heroin two years earlier. Although that evidence was the product of an illegal search, the Court held that the defendant's assertion that he had never possessed narcotics "opened the door, solely for the purpose of attacking the defendant's credibility," to evidence that the government had previously seized in violation of the Fourth Amendment. *Id.* at 64.

The Court applied the same principles in *United States* v. *Havens*, 446 U.S. 620 (1980). There, the defendant took the stand and denied that he had been involved in the cocaine smuggling scheme with which he was charged. On cross-examination, the defendant denied that he had possessed certain incriminating material when he returned to this country from a trip abroad. The government then introduced evidence that law enforcement officers had illegally seized from his luggage.[3] The Court approved the admission of the improperly obtained material to impeach the defendant's testimony.

In both *Walder* and *Havens*, this Court reasoned that the benefits of the exclusionary rule must be weighed against its costs. The Court emphasized that arriving at the truth is "a fundamental goal of our legal system." *Havens*, 446 U.S. at 626. It reaffirmed that a defendant's election to testify includes the obligation to testify truthfully, and it found "essential * * * to the proper functioning of the adversary system" the government's ability to conduct "proper and effective cross-examination * * * [of] seemingly false statements." *Havens*, 446 U.S. at 626-627; see also *Walder*, 347 U.S. at 65. Against these values, the Court balanced the deterrent function of the exclusionary rule. See *Havens*, 446 U.S. at 626-627. It determined that the purposes of the exclusionary rule are adequately served by denying the government the ability to make affirmative use of illegally procured evidence, and it deemed the "incremental furthering" of deterrence achieved by forbidding the impeachment of a testifying defendant insuffi-

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[3] The defendant's traveling companion had been stopped upon arriving in the United States; a search revealed that he had cocaine sown into makeshift pockets on his shirt. Police acting without a warrant found in the defendant's suitcase a T-shirt from which pieces that matched the makeshift pockets on his friend's shirt had been cut. *United States* v. *Havens*, 446 U.S. 620, 621-622 (1980).

cient "to permit or require that false testimony go unchallenged, with the resulting impairment of the integrity of the factfinding goals of the criminal trial." *Id.* at 627.

The Court's decisions in *Walder* and *Havens* reflect a more general principle that the rules that constrain the government in its direct case do not necessarily apply to matters of rebuttal and impeachment. In order to avoid a serious distortion of the truth-seeking process, the Court has permitted the government in a number of settings to use evidence for impeachment purposes even if the government would not be permitted to use the same evidence affirmatively. See, *e.g.*, *Tennessee* v. *Street*, 471 U.S. 409 (1985) (government may offer into evidence a co-defendant's confession, otherwise inadmissible under *Bruton* v. *United States*, 391 U.S. 123 (1968), to correct a potentially misleading impression created by the defendant's testimony); *Jenkins* v. *Anderson*, 447 U.S. 231 (1980) (government may impeach a testifying defendant with his failure to tell his exculpatory story prior to his arrest); *Doyle* v. *Ohio*, 426 U.S. 610, 619-620 n.11 (1976) (government may impeach a defendant with his failure to tell his exculpatory story after receiving *Miranda* warnings if defendant testifies that he did tell that story to the police after his arrest); *Harris* v. *New York*, 401 U.S. 222 (1971) (government may impeach a testifying defendant with a statement taken in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966)). The Court's rulings in each of those cases, as in *Walder* and *Havens*, evidences the Court's recognition that the truth-seeking process is more seriously distorted if false testimony is permitted to go uncorrected than if reliable evidence is kept from the jury in the first instance.

2. The same principles should apply to statements obtained through pretrial interrogation conducted in viola-

tion of the Sixth Amendment. Although the Sixth Amendment exclusionary rule forbids the affirmative use of such statements, the strong policy of promoting the truth-finding process at trial outweighs the justification for extending the Sixth Amendment exclusionary rule to evidence that is offered for impeachment purposes.

The Sixth Amendment right to counsel is similar in some important respects to the Fourth Amendment right to be free from illegal searches and seizures. Like the Fourth Amendment, the Sixth Amendment imposes obligations on the government that can be violated before trial. After arraignment or its equivalent, "government efforts to elicit information from [an] accused, including interrogation, represent 'critical stages' at which the Sixth Amendment applies." *Michigan* v. *Jackson,* 475 U.S. at 630. Thus, the police may violate the Sixth Amendment if they elicit statements from an indicted defendant who has not validly waived his right to counsel. See *Brewer* v. *Williams,* 430 U.S. 387 (1977). They also may violate the Sixth Amendment if they deliberately elicit incriminating statements from an uncounseled defendant who does not realize that he is speaking to a state agent or informant. *Maine* v. *Moulton,* 474 U.S. 159, 176 (1985); *United States* v. *Henry,* 447 U.S. 264, 274 (1980); see *Massiah* v. *United States,* 377 U.S. 201 (1964).

Unlike the Fifth Amendment, which explicitly prohibits the use of compelled self-incriminating testimony, neither the Fourth Amendment nor the Sixth Amendment expressly requires the exclusion of unlawfully obtained evidence. Nor is exclusion mandated by concerns about the probative character or reliability of such evidence. To the contrary, evidence obtained in violation of the Fourth or Sixth Amendment right to counsel is generally "the most probative information" available but is excluded

without regard to its reliability. *Stone* v. *Powell*, 428 U.S. 465, 490 (1976); *Moulton*, 474 U.S. at 191 (Burger, C.J., dissenting); *Henry*, 447 U.S. at 289 (Rehnquist, J., dissenting); *Massiah*, 377 U.S. at 208-209 (White, J., dissenting); *Mapp* v. *Ohio*, 367 U.S. 643, 656 (1961). And evidence taken in violation of the Fourth or the Sixth Amendment typically is not "coerced" or "compelled," as is the case with evidence obtained in violation of the Fifth Amendment. See *Massiah*, 377 U.S. at 209-211 (White, J., dissenting).

Evidence that is coerced or compelled in violation of the Fifth Amendment may not be used either affirmatively or for impeachment purposes. See *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979); *Mincey* v. *Arizona*, 437 U.S. 385, 397-398 (1978). As the Court has explained, the admission of such evidence for either purpose would directly contravene the prohibition in the Fifth Amendment against compelling a person "to be a witness against himself" or would be so unreliable that its use at trial for any purpose would violate due process. By contrast, the impeachment use of evidence seized in violation of the Fourth or Sixth Amendments does not violate the express terms of any constitutional provision, but simply brings into question whether to apply a court-made exclusionary rule.

This Court has chosen the exclusionary rule to remedy Sixth as well as Fourth Amendment violations. *Mapp* v. *Ohio*, 367 U.S. at 648, 656 (Fourth Amendment); *Weeks* v. *United States*, 232 U.S. 383, 391-393 (1914) (Fourth Amendment); *Moulton*, 474 U.S. at 180 (Sixth Amendment); *Henry*, 447 U.S. at 282 n.6 (Blackmun, J., dissenting) (Sixth Amendment). The question whether to invoke the Sixth Amendment exclusionary remedy, like the analogous question with respect to the Fourth Amendment exclusionary rule, may be answered by balancing the

societal costs of the rule against its benefits. *Nix* v. *Williams*, 467 U.S. 431, 446 (1984). Because the Fourth and Sixth Amendments extend their protection in similar ways, the same considerations that the Court weighed in *Walder* and *Havens* are relevant in the present setting, and they dictate that the balance be struck in the same way.

a. On one side of the balance is the interest in accurate verdicts. "[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986); *Stone*, 428 U.S. at 490; *United States* v. *Nobles*, 422 U.S. 225, 230 (1975). There is a weighty public interest in "prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States*, 394 U.S. 165, 175 (1969). As this Court has stated repeatedly, a constitutional violation warrants the exclusion of evidence only if the benefits from exclusion are worth "the enormous societal cost of excluding truth in the search for truth in the administration of justice." *Nix*, 467 U.S. at 445; see also *Solem* v. *Stumes*, 465 U.S. 638, 650 (1984); *Havens*, 446 U.S. at 626-628; *Hass*, 420 U.S. at 722; *Harris*, 401 U.S. at 224-226; *Alderman*, 394 U.S. at 174-175.

When the Court is weighing the exclusion of evidence that is intended to aid the jury in assessing the credibility of a defendant's testimony, an additional factor bears on the inquiry. In that setting, the general interest in promoting accurate factfinding is enhanced by the special need to guard against perjury.

The right of every defendant to testify includes the obligation to testify truthfully.[4] The introduction of

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[4] "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed

evidence for impeachment enforces that obligation by allowing the contradiction of "seemingly false statements" the defendant makes on the stand. *Havens,* 446 U.S. at 627. It would be senseless if the right to the assistance of counsel, which exists "to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution" (*United States* v. *Wade,* 388 U.S. 218, 227 (1967)), were interpreted to prohibit the prosecution, when faced with apparently perjurious testimony, from "utiliz[ing] the traditional truth-seeking devices of the adversary process" (*Harris*, 401 U.S. at 225).

b. On the other side of the balance is the marginal deterrent effect that would be served by barring the impeachment use of evidence obtained in violation of the Sixth Amendment. For several reasons, the interest in deterrence is even smaller in the Sixth Amendment context than in the Fourth Amendment setting.

First, the difference in the elements of Fourth and Sixth Amendment violations may make deterrence a less compelling concern under the Sixth Amendment. A Fourth Amendment violation is complete at the time of the illegal search or seizure; the introduction of the illegally seized evidence is not an element of the violation. By contrast, the pretrial interrogation of a defendant in the absence of his counsel does not, in itself, make out a Sixth Amendment violation; the violation is complete only when the defendant's statement is introduced against him in a prosecution for the crime with which he was charged at the

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to include the right to commit perjury. * * * Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately." *Harris*, 401 U.S. at 225; see also *Havens*, 446 U.S. at 626; *Oregon* v. *Hass*, 420 U.S. 714, 723 (1975); *Walder*, 347 U.S. at 65.

time of the interrogation. See *Massiah*, 377 U.S. at 206 (Sixth Amendment violation is complete "when there [is] used against [a defendant] at his trial evidence of his own incriminating words"). An uncounseled pretrial interrogation may be perfectly proper, for example, if the evidence is introduced in connection with offenses with which the defendant was not charged at the time of the interrogation. See *Moulton*, 474 U.S. at 178-180 & n.16. Accordingly, in that setting, there is no Sixth Amendment violation until and unless the prosecution offers the fruits of the interrogation into evidence at the trial on the already-charged crimes. For that reason, there is no misconduct to deter, since the government's out-of-court conduct does not amount to a constitutional violation, and since the court can prevent the constitutional violation from coming to pass simply by excluding the evidence from the government's case in chief at trial.

Secondly, as this Court recognized in *Jackson*, the police conducting a pretrial interrogation often may not be aware that the defendant has requested counsel. The Court has held in *Jackson* that knowledge of the request for counsel must be imputed to the police, see 475 U.S. at 634, and evidence obtained as a result of such an interrogation must be excluded from the government's case in chief regardless of the officers' ignorance of the invocation of counsel. Nonetheless, the exclusion of evidence for all purposes in that setting is not likely to serve a significant deterrent purpose, since the police will have no reason to refrain from seeking a waiver of the defendant's Sixth Amendment rights and questioning him if they are unaware that he has requested counsel.

Finally, even if the interest in deterrence were the same in the case of the Fourth and Sixth Amendment exclusionary rules, this Court has already held in the Fourth Amendment setting that the marginal deterrence achieved by the exclusion of evidence offered for impeachment pur-

poses is not sufficient to justify its costs. The same analysis applies in the Sixth Amendment context. There is no reason to suppose that deterrence is more effective or more essential in the Sixth Amendment context than in the Fourth Amendment setting; there is therefore no reason to exclude evidence under a Sixth Amendment rationale if similar evidence would not be excluded under the Fourth Amendment.[5]

3. To be sure, the analogy between the Fourth and Sixth Amendments is imperfect because of the different purposes served by the two provisions. Again, however, that difference argues against the exclusion of evidence offered for impeachment purposes, not in its favor.

The purpose of the Sixth Amendment is to ensure that in the operation of the adversary process, the defendant is not unfairly disadvantaged by being forced to confront the professional prosecutor and the technicalities of the criminal justice system without trained legal assistance. *United States* v. *Ash*, 413 U.S. 300, 306-313 (1973). Thus, the Sixth Amendment guarantee of counsel exists "not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States* v. *Cronic*, 466 U.S. 648, 658 (1984). The "fair trial" that the Sixth Amendment seeks to ensure is a trial in which "a defendant has the assistance necessary to justify reliance on the

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[5] In *Oregon* v. *Hass*, 420 U.S. 714, 723 (1975), the Court acknowledged that an officer may have some incentive to disregard a suspect's invocation of his right to counsel, since the officer may have little to lose and something to gain "by way of possibly uncovering impeachment material." That "speculative possibility," however, was not sufficient to persuade the Court to require the exclusion of highly probative evidence that may be the only available antidote to false testimony at trial. Precisely the same analysis applies here; indeed, the only difference between this case and *Hass* is that in this case the defendant had been formally charged and in *Hass* he had not been.

outcome of the proceeding." *Strickland* v. *Washington*, 466 U.S. 668, 689, 692 (1984). Put another way, the Sixth Amendment guarantees the right to counsel "because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Id.* at 685.

Because the purpose of the Sixth Amendment is to ensure that the adversary process functions properly, the Court's Sixth Amendment decisions have focused not only on the right of defendants to counsel, but also on "the necessity of preserving society's interest in the administration of criminal justice." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). Thus, the Court has noted, remedies for Sixth Amendment violations "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests," *ibid.*, such as " 'the public interest in having the guilty brought to book,' " *id.* at 366 n.3 (quoting *United States* v. *Blue*, 384 U.S. 251, 255 (1966)).

When a defendant makes false statements on the stand, he jeopardizes the very "ability of the adversarial system to produce just results" that the Sixth Amendment is meant to protect. The interest in guarding against the distortion of the truth-seeking process, which is a principal goal of the Sixth Amendment, counsels strongly against unnecessarily handicapping the advocates in their ability to expose false evidence.

The use of prior inconsistent statements is one of the most effective techniques available to the advocate to expose perjury; indeed, the admissibility of prior inconsistent statements for impeachment purposes no doubt prevents much perjured testimony from ever being offered, by dissuading witnesses who otherwise would be tempted to fabricate or shade their testimony. The use of the fruits of pretrial interrogation for impeachment purposes—even

when that evidence would be barred from the government's case in chief—is therefore not at odds with the basic purpose of the Sixth Amendment to "protect[] against unfairness by preserving the adversary process in which the reliability of proffered evidence may be tested in cross-examination." *Nix*, 467 U.S. at 446.

Nor is there anything fundamentally unfair about permitting impeachment in these circumstances. As this Court noted many years ago, the advantages that a defendant enjoys in a criminal case must be "counterweighted with * * * conditions to keep the advantage from becoming an unfair and unreasonable one. The price a defendant must pay for attempting to prove [a fact] * * * is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." *Michelson* v. *United States*, 335 U.S. 469, 478-479 (1948); see also *Havens*, 446 U.S. at 627-628 ("It is essential * * * to the proper functioning of the adversary system that when a defendant takes the stand, the government be permitted proper and effective cross-examination in an attempt to elicit the truth.").

The defendant has substantial control over the ability of the prosecution to make use of pretrial statements for impeachment purposes. The prosecution can offer such prior statements only after the defendant, with the assistance of counsel, makes a voluntary decision to testify. Moreover, impeachment is permissible only if the defendant gives testimony that contradicts his previous statements. Thus, defense counsel can predict, and to a significant extent control, the possible impeachment use of prior statements. See *Jenkins* v. *Anderson*, 447 U.S. 231, 238 (1980). In addition, the defendant can explain the circumstances under which the impeaching statements were made, and defense counsel can ensure that the defendant's explanation of any inconsistency is fully aired. Presumably, the jury will be

able to recognize honest inconsistencies and appropriately discount the prosecution's reliance on minor discrepancies among the defendant's statements.

In sum, the introduction of uncounseled statements for impeachment purposes does not risk denying the defendant "a fair opportunity to present a defense at the trial itself." *Wade*, 388 U.S. at 226. The limited use of uncounseled statements for impeachment leaves "no effect of a constitutional dimension which needs to be purged to make certain that respondent has been effectively represented and not unfairly convicted." *Morrison*, 449 U.S. at 366.

B. A Violation Of The Prophylactic Rule Established By *Michigan* v. *Jackson* Is Adequately Deterred By Excluding Improperly Obtained Evidence From The Government's Case In Chief

Even if the Court is not prepared to hold that the fruits of an uncounseled pretrial interrogation should always be admissible for impeachment purposes, it should still uphold the admission of such evidence in a case such as this one, where the court found not a direct violation of the Sixth Amendment, but only a violation of the prophylactic rule of *Michigan* v. *Jackson*, 475 U.S. 625 (1986).

In *Jackson*, the Court held that once a defendant's Sixth Amendment right to counsel had attached and the defendant had requested counsel, "any [subsequent] waiver of the defendant's right to counsel for [a] police-initiated interrogation is invalid." 475 U.S. at 636. The Court's conclusion was an explicit application of the rule it had established to safeguard the Fifth Amendment privilege against compelled self-incrimination in *Edwards* v. *Arizona*, 451 U.S. 477 (1981). There, the Court held that a suspect in custody who had " 'expressed his desire to deal with the police only through counsel, is not subject to further in-

terrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.' " *Jackson*, 475 U.S. at 626 (quoting *Edwards*, 451 U.S. at 484-485).

Edwards establishes a "prophylactic rule," as does *Miranda*, to protect the Fifth Amendment privilege against compulsory self-incrimination. *Solem*, 465 U.S. at 644; see *Edwards*, 451 U.S. at 484 ("additional safeguards" necessary to protect privilege when suspect has requested counsel); *Jackson*, 475 U.S. at 639 (*Edwards* provides "second layer of protection" for the Fifth Amendment privilege). The Court in *Jackson*, expressly recognizing that *Edwards* established a "bright-line rule to safeguard pre-existing rights," adopted the "same rule" on the ground that "the need for *additional safeguards* [is] no less clear[] when the request for counsel is made at an arraignment and when the basis for the claim is the Sixth Amendment." *Jackson*, 475 U.S. at 626, 636 (emphasis added). Thus the *Jackson* rule, like the rules in *Miranda* and *Edwards*, is a prophylactic measure.[6]

This Court has already determined that violations of the prophylactic rule established by *Miranda* to guard the

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[6] The prophylactic character of the rule in *Jackson* is evidenced by the fact that the rule is triggered only by a request for counsel: despite the fact that *all* defendants have a Sixth Amendment right to counsel after "the initiation of adversary judicial proceedings" (*United States* v. *Gouveia*, 467 U.S. 180, 187-188 (1984)), only those who make an explicit request for counsel receive the benefits of the *Jackson* no-waiver rule. See *Jackson*, 475 U.S. at 633 n.6 (right to counsel does not turn on request; but "the defendant's request for counsel [functions] as an extremely important fact in considering the validity of a subsequent waiver in response to police-initiated interrogation"); *id.* at 639-642 (Rehnquist, J., dissenting) (criticizing the linkage of the *Jackson* no-waiver rule to a request for counsel when the right to counsel does not depend on a request for counsel).

Fifth Amendment are adequately deterred by excluding improperly obtained evidence from the government's case in chief. In *Harris* v. *New York, supra*, the Court allowed a defendant's trial testimony about a series of drug sales he made to an undercover officer to be impeached on cross-examination with statements the defendant made immediately after arrest and before receiving *Miranda* warnings. The Court came to an identical conclusion in *Oregon* v. *Hass, supra*, where it allowed impeachment with inculpatory information taken from a suspect after he had been given *Miranda* warnings and had requested a lawyer. In both cases, the Court reasoned that where the circumstances do not indicate that a defendant's constitutional privilege against compelled self-incrimination has been violated,[7] the importance of the "search for truth in a criminal case" (*Hass*, 420 U.S. at 722) outweighs the deterrent value of extending the exclusion of evidence that is already barred from the prosecution's affirmative case. *Hass*, 420 U.S. at 722-724; *Harris*, 401 U.S. at 224-226.

The same balance must be struck in this case. The *Jackson* presumption—that if the government initiates an exchange with a defendant who has requested counsel the defendant cannot be found to have waived his Sixth Amendment right to counsel—is deliberately overbroad. Like *Miranda*'s "preventive medicine," it provides a remedy even to those defendants who have suffered no constitutional wrong. *Oregon* v. *Elstad*, 470 U.S. 298, 309 (1985). It is enough that *Jackson*, like *Miranda*, bars

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[7] As we have noted (pages 12-13, *supra*), statements taken in violation of the Fifth Amendment itself, rather than its prophylactic safeguards, can never be used at trial. *New Jersey* v. *Portash*, 440 U.S. 450 (1979). Because the use of compelled self-incriminating testimony violates the text of the Amendment, the Court has held that "[b]alancing [of the kind done in *Harris* and *Hass*] is not simply unnecessary. It is impermissible." *Portash*, 440 U.S. at 459.

the introduction in the government's case in chief of evidence obtained in violation of its rule.[8]

This Court's recent decision in *Patterson* v. *Illinois*, 108 S. Ct. 2389 (1988), underscores the strength of the analogy to *Harris* and *Hass* by emphasizing the close parallel between the principles governing the waiver of Fifth and Sixth Amendment rights in the case of uncounseled pretrial interrogations. The Court in *Patterson* held that in that setting Sixth Amendment rights are not intrinsically more difficult to waive than Fifth Amendment rights, and that the standard *Miranda* warnings are sufficient to support a waiver of both rights. 108 S. Ct. at 2398. As the Court explained, an attorney serves the same "limited purpose" in custodial interrogation whether the interrogation occurs before or after the initiation of formal charges. There is no "substantial difference between the usefulness of a lawyer to a suspect during custodial interrogation, and his value to an accused at postindictment questioning." *Ibid.*; see

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[8] Once the balance has been struck allowing the use of improperly obtained evidence to impeach, the admission of the evidence in any particular case depends on whether it is clear that the defendant is aware of the right to counsel and yet voluntarily makes a statement. See *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) (establishing as standard for waivers of counsel that action must not only be voluntary, but must also constitute a knowing and intelligent "relinquishment or abandonment of a known right or privilege"). As the Court has decided in the Fifth Amendment context, any statement would be admissible for impeachment if it met this " 'old' due process voluntariness test." See *Oregon* v. *Elstad*, 470 U.S. 298, 308-309 (1985).

Respondent's waiver satisfied that standard. This Court's decision in *Patterson* v. *Illinois*, 108 S. Ct. 2389, 2397 (1988), makes it clear that *Miranda* warnings "sufficiently apprise[] [a defendant] of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights." Respondent received full *Miranda* warnings prior to his September 9 interview, and he indicated his understanding of them.

also *id.* at 2395-2396 & n.6; cf. *Ash*, 413 U.S. at 312. There should therefore be no difference in the consequences that follow the violation of the prophylactic rule established by *Miranda*, and those that follow the violation of the parallel prophylactic rule established by *Jackson*.[9]

CONCLUSION

The judgment of the Michigan Court of Appeals should be reversed.

Respectfully submitted.

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APRIL 1989

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[9] Although the issue is not before this Court, it is not even clear in this case that the police violated the rule of *Michigan* v. *Jackson*, *supra*. Although the matter is not developed in detail in the record, it appears that respondent initiated the exchange with the police on September 9 (see Pet. App. 3a; J.A. 32-33; Tr. 117) and that he received complete *Miranda* warnings, which were sufficient to justify a waiver of his Sixth Amendment rights (see *Patterson* v. *Illinois*, *supra*). While the Michigan Court of Appeals did not explain its reason for finding that *Michigan* v. *Jackson* had been violated, it may be that the court regarded respondent's reference to his lawyer as a request for counsel and the police officer's statement that respondent did not need to consult with his lawyer as constituting an initiation of interrogation despite a request for counsel, in violation of the *Jackson* rule.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00219